LIBRARY
SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1951

No. 305

CITIES SERVICE COMPANY, AND THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, PETITIONERS,

vs.

J. HOWARD McGRATH, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 8, 1951.

CERTIORARI GRANTED NOVEMBER 5, 1951.

INDEX

	PAGE
Statement Under Rule XV	1
Complaint	3
Exhibit "A"—Vesting Order 12960	8
Exhibit "B"—Letter dated March 28, 1949	11
Exhibit "C"—Letter dated June 17, 1949	13
Exhibit "D"—Letter dated January 5, 1950	18
Answer of Chase National Bank	21
Answer of Cities Service Company	29
Stipulation of Facts	32
Exhibit "1"—Letter dated May 19, 1949	35
Notice of Motion of Plaintiff for Judgment on the Pleadings or for Summary Judgment	37
Notice of Motion of Chase National Bank for Judgment Dismissing the Complaint or for Summary Judgment	39
Notice of Motion for Cities Service Company for Judgment Dismissing the Complaint or for Summary Judgment	41
Opinion of McGohey, *D.J.*	43

PAGE

Order and Judgment Appealed From 49

Notice of Appeal 51

Stipulation as to Designation of Contents of Record on Appeal 53

Proceedings in U.S.C.A., Second Circuit 55

Opinion, Hand, J. 55

Judgment 62

Clerk's certificate ..... (omitted in printing) 62

Order allowing certiorari 63

United States Court of Appeals

FOR THE SECOND CIRCUIT

55-262

J. HOWARD MCGRATH, Attorney General, as Successor to the Alien Property Custodian,

Plaintiff-Appellant,

—v.—

CITIES SERVICE COMPANY,

and

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,

Defendants-Appellees.

Statement Under Rule XV

This cause was commenced on or about January 30, 1950. The original parties are those set forth in the caption hereof.

The complaint was filed on January 30, 1950. The answer of defendant, The Chase National Bank of the City of New York, was filed on March 13, 1950. The answer of defendant, Cities Service Company, was filed on March 13, 1950. Plaintiff's notice of motion for judgment on the pleadings, or, in the alternative, for summary judgment was filed on May 26, 1950. Notice of motion of defendant, The Chase National Bank of the City of New York, for judgment on the pleadings, or, in the alternative, for summary judgment was filed on June 2, 1950. Notice of

Statement Under Rule XV

4 motion of defendant, Cities Service Company, for judgment on the pleadings, or, in the alternative, for summary judgment was filed on June 8, 1950.

Defendants were not arrested, no bail was taken and no property was attached or arrested. The cause came on for hearing on June 15, 1950, before the Honorable John F. X. McGohey, District Judge, United States District Court for the Southern District of New York. An opinion of the Court was filed October 24, 1950, granting summary judgment in favor of the defendants.

Final judgment was entered on November 8, 1950, granting defendants' motion for summary judgment, denying plaintiff's motion for judgment on the pleadings and for summary judgment, and dismissing the complaint on the merits. Plaintiff filed notice of appeal from said final judgment on December 3, 1950.

5

6

Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 53-262

J. HOWARD MCGRATH, Attorney General, as Successor to the Alien Property Custodian,

Plaintiff,

—against—

CITIES SERVICE COMPANY

and

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,

Defendants.

J. HOWARD MCGRATH, Attorney General, as successor to the Alien Property Custodian, by his attorney, IRVING H. SAYPOL, United States Attorney for the Southern District of New York, alleges that:

1. Jurisdiction of this Court is invoked under Section 17 of the Trading with the Enemy Act, as amended (40 Stat. 425, U. S. C. T. 50 A.), and Section 1345 of Title 28, United States Code.

2. On information and belief the defendant, Cities Service Company, is and has been at all times material hereto a corporation duly organized and existing under and by

10 virtue of the laws of the State of Delaware, and has its principal place of business in New York, New York, and within this district.

3. On information and belief the defendant, The Chase National Bank of the City of New York, is and has been at all times material hereto, a national banking association organized and existing under the laws of the United States and has its principal place of business in New York, New York, and within this district.

11 4. By Vesting Order No. 12960 issued March 11, 1949, filed with the Division of the Federal Register on March 28, 1949, and published in 14 F. R. 1405 March 29, 1949, a true copy of which is attached hereto as Exhibit A, plaintiff vested the debts or other obligations evidenced by the Cities Service Company 5% Gold Debenture Bearer Bonds Nos. M 23393, M 23318 and M 7029, of $1,000 face value each.

5. On information and belief the debentures numbered M 23293 and M 23318 were authenticated and delivered under an indenture dated as of June 2, 1930 between the
12 defendants, Cities Service Company and The Chase National Bank of the City of New York, as trustee; and that said debentures due in 1950 have been called for redemption and defendant, The Chase National Bank, as trustee, is holding funds for the purpose of paying the redemption values of these outstanding debentures.

6. On information and belief the debenture numbered M 7029 was authenticated and delivered under an indenture dated as of March 1, 1929, between the defendants,

Cities Service Company and The Chase National Bank of the City of New York, as trustee, and is due in 1969. 13

7. On or about March 28, 1949, a duly authorized representative of the plaintiff mailed to the defendant, Cities Service Company, a letter, a true copy of which is attached hereto as Exhibit B, in which was enclosed a copy of the Vesting Order.

8. By letters dated June 17, 1949 and January 5, 1950, to Cities Service Company by duly authorized representatives of the plaintiff, true copies of which letters are attached hereto as Exhibits C and D, respectively, said defendant was authorized and directed to cancel bonds Nos. M 23293 and M 23318 and to issue in lieu thereof its check representing the proceeds of redemption with accrued interest to date; and to cancel bond No. M 7029 and to issue in lieu thereof a new bond of the same series and for the same face value, said bond to have affixed thereto the number of coupons corresponding to the unredeemed coupons affixed to bond No. M 7029. 14

9. Defendants have failed and refused, and still fail and refuse, to comply with plaintiff's demand herein. 15

10. The three debentures Nos. M 23293, M 23318 and M 7029 referred to herein are not in the possession of the plaintiff, and are not obtainable by plaintiff.

11. No previous application has been made for the relief herein requested.

16 WHEREFORE, plaintiff prays:

1. That the defendants be ordered to cancel bonds Nos. M 23293 and M 23318 on their books and records, and to issue in lieu thereof their check drawn payable to the "Attorney General of the United States, Account No. 28-33518", representing the proceeds of redemption for such bonds with accrued interest to date, such interest to include all interest represented by coupons which, according to defendants' records, were not paid prior to March 28, 1949.

17

2. That defendants be ordered to cancel bond No. M 7029 on their books and to issue in lieu thereof a new bond in the name of the "Attorney General of the United States, Account No. 28-33518" of the same series and for the same face value, said bond to have affixed thereto a like number of coupons which, according to the records of the defendants, were not paid prior to March 28, 1949, and said bond to be forwarded to the Office of Alien Property, Department of Justice, Washington 25, D. C.

3. That as an alternative and instead of issuing a bond
18 to replace bond No. M 7029 defendants be ordered to cancel said bond on their books and records and issue in lieu thereof their check payable to the "Attorney General of the United States, Account No. 28-33518" representing the proceeds of redemption for such bond with accrued interest to date, such interest to include all interest represented by coupons which, according to defendants' records, were not paid prior to March 28, 1949.

4. For such other and further relief as the Court may deem proper.

Dated: New York, N. Y., January 30, 1950.

IRVING H. SAYPOL,
United States Attorney for the Southern District of New York,
Attorney for Plaintiff,

By: JAMES A. DEVLIN,
Assistant United States Attorney
Office and P. O. Address:
United States Court House,
Foley Square,
New York 7, New York.

(Verified January 30, 1950.)

EXHIBIT "A" ANNEXED TO COMPLAINT

Form APC-60
Rev. 6-2-47

F-28-29488-D-1

DEPARTMENT OF JUSTICE
OFFICE OF ALIEN PROPERTY

VESTING ORDER 12960

Re: Debts owing to Adline Von Campenhausen also known as Baronese Adline Von Campenhausen

Under the authority of the Trading with the Enemy Act, as amended, Executive Order 9193, as amended, and Executive Order 9788, and pursuant to law, after investigation, it is hereby found:

1. That Adline Von Campenhausen also known as Baronese Adline Von Campenhausen, whose last known address is Wehrda-Huenfeld/Hessen, Germany, is a resident of Germany and a national of a designated enemy country (Germany);

2. That the property described as follows:

a. That certain debt or other obligation, matured or unmatured, evidenced by two (2) Cities Service Company 5% Gold Debentures Bearer Bonds, of $1,000 face value each, bearing the numbers M 23293 and M 23318, and any and all rights to demand, enforce and collect the aforesaid debt or other obligation, together with any and all rights

in, to and under said bonds, including particularly, but not limited to, any and all rights of redemption, and, 25

b. That certain debt or other obligation, matured or unmatured, evidenced by one (1) Cities Service Company 5% Gold Debenture Bearer Bond, of $1,000 face value, bearing the number M 7029, and any and all rights to demand, enforce and collect the aforesaid debt or other obligation, together with any and all rights in, to and under said bond,

26

is property within the United States owned or controlled by, payable or deliverable to, held on behalf of or on account of, or owing to, or which is evidence of ownership or control by, Adline Von Campenhausen also known as Baronese Adline Von Campenhausen, the aforesaid national of a designated enemy country (Germany);

and it is hereby determined:

3. That to the extent that the person named in subparagraph 1 hereof is not within a designated enemy country, the national interest of the United States requires that such person be treated as a national of a designated enemy country (Germany). 27

All determinations and all action required by law, including appropriate consultation and certification, having been made and taken, and, it being deemed necessary in the national interest,

THERE IS HEREBY VESTED in the Attorney General of the United States the property described above, to be held,

used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States.

The terms "national" and "designated enemy country" as used herein shall have the meanings prescribed in section 10 of Executive Order 9193, as amended.

[40 Stat. 411, 50 U. S. C. App. 1; 55 Stat. 839, 50 U. S. C. App. Sup. 616; Pub. Law 322, 79th Cong., 60 Stat. 50; Pub. Law 671, 79th Cong., 60 Stat. 925; E.O. 9193, July 6, 1942, 7 F.R. 5205, 3 CFR, Cum. Supp.; E.O. 9567, June 8, 1945, 10 F.R. 6917, 3 CFR, 1945 Supp.; E.O. 9788, Oct. 14, 1946, 11 F.R. 11981]

Executed at Washington, D. C., on March 11, 1949.

For the Attorney General,

(Official Seal)

(Signed) DAVID L. BAZELON

David L. Bazelon
Assistant Attorney General
Director, Office of Alien Property

1014-49

EXHIBIT "B" ANNEXED TO COMPLAINT

COPY

March 28, 1949

Cities Service Company,
60 Wall Street,
New York 5, New York

Gentlemen:

Enclosed is a certified copy of Vesting Order 12960 executed for the Attorney General of the United States March 11, 1949, vesting in the Attorney General "Debts owing to Adline Von Campenhausen also known as Baronese Adline Von Campenhausen".

For the purpose of identifying the account of Adline Von Campenhausen, alias, on the books and records of the Office of Alien Property, Account No. 28-33518 has been assigned.

Under paragraph 2 of Vesting Order 12960 there is now vested in the Attorney General of the United States

(a) That certain debt or other obligation, matured or unmatured, evidenced by two (2) Cities Service Company 5% Gold Debentures bearer Bonds, of $1,000 face value each, bearing the numbers M 23293 and M 23318, and any and all rights to demand, enforce and collect the aforesaid debt or other obligation, together with any and all rights in to and under said bonds, including particularly, but not limited to, any and all rights of redemption, and

(b) That certain debt or other obligation, matured or unmatured, evidenced by one (1) Cities Service

Exhibit "B" Annexed to Complaint

Company 5% Gold Debenture Bearer Bond, of $1,000 face value, bearing the number M 7029, and any and all rights to demand, enforce, and collect the aforesaid debt or other obligation, together with any and all rights in, to and under said bond.

You are therefore authorized and directed to note on your books and records, even though the above described bonds are in bearer form, that the Attorney General of the United States is now the owner of them.

In the near future you will be advised as to the action this office will require you to take with respect to the vested property.

Please sign the acknowledgment on the attached copy of this letter and return same in the franked addressed envelope enclosed for that purpose and advise this office of your action in the matter.

Very truly yours,

For the Attorney General:

/s/ Malcolm S. Mason
Malcolm S. Mason
Acting Deputy Director
Office of Alien Property

Enclosures

EXHIBIT "C" ANNEXED TO COMPLAINT

COPY

June 17, 1949

Cities Service Company,
60 Wall Street,
New York 5, New York.

Gentlemen:

Reference is made to our letter of March 28, 1949, enclosing a certified copy of Vesting Order 12960, vesting in the Attorney General debts owing to Adline Von Campenhausen also known as Baronese Adline Von Campenhausen.

By paragraph 2 of the Vesting Order there were vested in the Attorney General of the United States

(a) That certain debt or other obligation, matured or unmatured, evidenced by two (2) Cities Service Company 5% Gold Debentures Bearer Bonds, of $1,000 face value each, bearing the numbers M 23293 and M 23318, and any and all rights to demand, enforce and collect the aforesaid debt or other obligation, together with any and all rights in, to and under said bonds, including particularly, but not limited to, any and all rights of redemption, and,

(b) That certain debt or other obligation, matured or unmatured, evidenced by one (1) Cities Service Company 5% Gold Debenture Bearer Bond, of $1,000 face value, bearing the number M 7029, and any and all rights to demand, enforce and collect the aforesaid

40 debt or other obligation, together with any and all rights in, to and under said bond.

An investigation conducted by this office disclosed that the bonds mentioned in subdivisions (a) and (b) of paragraph 2 of the Vesting Order are at the present time in Germany. Under existing military regulations this office is unable to obtain the bonds.

You will note, however, from the Vesting Order, that the underlying obligations evidenced by the bonds in question, not merely the physical property (the bonds), were 41 found to be the property of Adline Von Campenhausen, alias, found by the Vesting Order to be a national of a designated enemy country (Germany). It has been held that

> "* * * For the purposes of immediate possession the determination of the Enemy Property Custodian [as to ownership and nationality] is conclusive, whether right or wrong."
>
> *Central Union Trust Company* v. *Garvan*, 254 U. S. 554, 566 (1921).

42 This decision has recently been affirmed in the case of *Silesian-American Corporation* v. *Clark*, 332 U. S. (Adv. Sh.) 469, 476-7 (1947), which also held that any person complying with a vesting order issued under the authority of the Trading with the Enemy Act, as amended, is exculpated from liability to any possible third party claimants by virtue of the provisions of Sections 7 (c) and 5 (b) (2) of the Trading with the Enemy Act, as amended. Section 7 (c) provides, in pertinent part, that

Exhibit "C" Annexed to Complaint

"Any payment, conveyance, transfer, assignment, or delivery of money or property made to the Alien Property Custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same." 43

And Section 5 (b) (2) provides that

"Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder." 44

Any persons claiming an interest in the property so vested are, by virtue of the provisions of Section 7 (c) of the Act, limited to proceedings against the Attorney General or the Treasurer of the United States for the recovery of the vested property or the proceeds thereof. 45

In your letter of January 11, 1949, you stated, in the case of the 5% Debentures due 1950, that these Debentures were called for redemption under date of July 28, 1947 at 102 and interest.

You are therefore authorized and directed to cancel bonds numbered M 23293 and M 23318, evidencing the debt

46 vested under paragraph 2 (a) of the Vesting Order, on your books and records and issue in lieu thereof your check representing the proceeds of redemption, with accrued interest to date. Since this office is unable to obtain the bonds and examine same in order to ascertain which coupons are still attached thereto you are also authorized and directed to include all interest represented by coupons which, according to your records, have not been presented for payment.

47 Your check representing the aforesaid proceeds of redemption, with accrued interest, is to be drawn payable to the order of the "Attorney General of the United States, Account No. 28-33518" and forwarded to the Office of Alien Property, Department of Justice, Washington 25, D. C., accompanied by a duplicate explanatory statement listing in detail the principal amount and interest payments.

With respect to bond number M 7029, you are authorized and directed to cancel this bond on your books and records and issue in lieu thereof a new bond of the same series and for the same face value. As stated before, since this office is unable to examine bond M 7029, you are requested to examine your records with respect to all coupons issued in
48 connection with this bond not yet presented for payment. The new bond, therefore, should have affixed thereto a like number of coupons which, according to your records, have not been presented for payment. The new bond is to be forwarded to the Office of Alien Property Department of Justice, Washington 25, D. C.

However, if it is impractical for you to issue a new bond in lieu of bond M 7029 you may issue your check for the redemption price thereof, with accrued interest to date,

including interest represented by coupons not yet presented for payment. This check should also be drawn payable to the order of the "Attorney General of the United States, Account No. 28-33518" and forwarded to the Office of Alien Property, Department of Justice, Washington 25, D. C.

Your prompt attention to this matter will be appreciated.

Very truly yours,

For the Attorney General:

/s/ DAVID L. BAZELON

David L. Bazelon
Assistant Attorney General
Director, Office of Alien Property

52 EXHIBIT "D" ANNEXED TO COMPLAINT

COPY

JDH:EJF:pjg

9-21-2222

REGISTERED MAIL

RETURN RECEIPT REQUESTED

Cities Service Company
60 Wall Street.
53 New York 5, New York

Gentlemen:

By letter dated March 28, 1949, a certified copy of Vesting Order No. 12960 was sent to you. Under this vesting order the Attorney General vested the debts or other obligations evidenced by Cities Service Company 5% Gold Debenture Bearer Bonds of $1,000 face value each, bearing the numbers M 23293, M 23318 and M 7029. By letter dated June 17, 1949 you were authorized and directed to cancel these bonds, since the original certificates were in Ger-
54 many, and to issue in lieu thereof your check representing the proceeds of redemption, with accrued interest to date, on bonds Nos. M 23293 and M 23318, including interest represented by coupons not yet presented for payment, and a new bond of the same series and for the same face value as bond No. 7029, to which should be affixed the like number of coupons which have not been presented for payment.

Reply to our demand was made by letter dated August 22, 1949, from the law offices of Millbank, Tweed, Hope and

Hadley on behalf of The Chase National Bank of the City of New York. This letter requested that authorization be granted to postpone compliance with the vesting order until the outstanding debentures themselves were obtained and presented. The reply, together with its enclosure, a copy of a letter dated July 1, 1947 from the law firm to the Office of Alien Property in connection with the vesting of obligations evidenced by two outstanding dividend checks, reviewed certain authorities and decisions, and expressed concern whether the Attorney General has the power "to vest obligations evidenced by fully negotiable debentures which appear to have been in Germany at the time the vesting order was issued" and which are still not available; and whether the immunity provisions of the Trading with the Enemy Act "would serve to protect persons who act in reliance upon orders of the Attorney General which are beyond his statutory and constitutional powers."

This Office has reviewed carefully the authorities cited, as well as the pertinent provisions of the Trading with the Enemy Act, as amended, and has concluded that the concern expressed is ill founded and that, therefore, there is no justifiable basis for further delay in complying with the direction of our letter of June 17, 1949, and with Vesting Order No. 12960.

It is our position that the issuance of the bonds created debts or obligations which were property within the United States which was subject to the Act and the authority of the Attorney General to vest as enemy property even though the bonds were payable to "bearer", and the instruments were not in the possession of the Attorney General. It is also our position that you will be fully protected by the Trading with the Enemy Act against double liability

upon compliance with the direction of June 7, 1949 and with the vesting order.

Accordingly, you are directed to comply with the demand made in our letter of June 17, 1949, with respect to the bonds Nos. M 23293, M 23318 and M 7029 by January 20, 1950. In the event that compliance is not had by that date, this Office will have to take appropriate action to enforce compliance.

I am sending a copy of this letter of Millbank, Tweed, Hope and Hadley.

Sincerely,

For the Attorney General:

/s/ HAROLD I. BAYNTON

Harold I. Baynton
Acting Director
Office of Alien Property
Department of Justice

Answer of Chase National Bank

61

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendant, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, by its attorneys, Milbank, Tweed, Hope & Hadley, for its answer to the complaint in this action:

62

FIRST DEFENSE.

1. With reference to the allegations of paragraph 4, admits that a purported Vesting Order No. 12960, a copy of which is attached to the complaint as Exhibit A, was issued and published as alleged; but denies that the Vesting Order was valid and effective; and denies that it vested debts or obligations evidenced by Cities Service Company's 5% Gold Debenture Bearer Bonds Nos. M 23293, M 23393, M 23318 and M 7029, or any of them; and further denies that any debt or obligation evidenced by Debenture No. M 23293 or its coupons or any other right thereunder, except any debt 63 or obligation evidenced by eight unpaid coupons, existed at the time of the purported vesting or now exists.

2. With reference to the allegations of paragraph 5, denies that the Chase National Bank, as Trustee, is holding funds for the purpose of paying the redemption value of the Debenture No. M 23293, and alleges that the said debenture was redeemed on or before July 26, 1948; and that before the issuance of Vesting Order No. 12960 all coupons thereof

64 except the coupons maturing between December 1940 and June 1944 were paid and the said debenture and all of its paid coupons were cremated.

3. With reference to the allegations of paragraph 8, admits the sending and receipt of the letters, copies of which were annexed as Exhibits C and D to the complaint, but denies that the plaintiff thereby effectively authorized or could authorize the actions therein called for and denies that plaintiff has made proper demand for the possession of the property attempted to be vested.

65 4. With reference to the allegations of paragraph 10: (a) alleges that it is without knowledge or information sufficient to form a belief as to whether Debenture No. M 23318 is obtainable by plaintiff; (b) on information and belief, denies that Debenture No. M 7039 is unobtainable by plaintiff.

SECOND DEFENSE

5. The complaint fails to state a claim against defendants upon which relief can be granted.

66 THIRD DEFENSE

6. The plaintiff has asserted that the debentures listed in Vesting Order No. 12960 were not within the United States or any of its possessions at the time of the purported vesting. If so, the property sought to be vested was not property within the United States at the time of the purported vesting.

7. Vesting Order No. 12960 and the directions in Exhibits C and D were and are invalid and ineffective because

not within the provisions of, or authorized by, Executive Order No. 9193, as amended (7 F. R. 5205, 10 F. R. 6917). 67

FOURTH DEFENSE

8. Vesting Order No. 12960 and the directions in Exhibits C and D annexed to the complaint were and are invalid and ineffective, in that they were not issued under authority of or in accordance with the provisions of the Trading with the Enemy Act, as amended (50 U. S. Code App. §§1 et seq.). 68

FIFTH DEFENSE

9. Vesting Order No. 12960 and the directions in Exhibits C and D annexed to the complaint, if in accord with the provisions of the Trading with the Enemy Act, as amended, and the Trading with the Enemy Act, as amended, to the extent that it authorizes the order or the directions in the above-mentioned exhibits, are, and each of them is, unconstitutional and void as contrary to the provisions of the Fifth Amendment of the United States Constitution.

SIXTH DEFENSE 69

10. Vesting Order No. 12960 and the directions contained in Exhibits C and D annexed to the complaint were and are beyond the power of the plaintiff to issue or make and beyond the power of Congress to authorize.

SEVENTH DEFENSE

11. The obligations here purported to be vested have been merged, respectively, in Debentures Nos. M 23293,

70 M 23318 and M 7029 and the coupons thereof, all of which were negotiable bearer instruments. None of the said instruments is now in the possession or control of the defendant The Chase National Bank of the City of New York; and, upon information and belief, none is in the possession or control of either the plaintiff or defendant Cities Service Company.

12. Debenture No. M 23293 has been paid and it and all its paid coupons have been cremated.

71 13. The person presently in possession of Debenture No. M 23318 and of any unpaid coupons thereto appertaining is unknown to the Chase National Bank, but if the assertions of plaintiff are true, is not within the United States or subject to the jurisdiction of this Court.

14. On information and belief, Dominick & Dominick, 14 Wall Street, New York 5, N. Y., at the present time has possession of Debenture No. M 7029 and any unpaid coupons appertaining thereto. Dominick & Dominick is a partnership doing business within the Southern District of New York and is subject to the jurisdiction of this Court.

72 15. The persons having possession of Debentures Nos. M 23318 and M 7029 are indispensable parties to the present action.

EIGHTH DEFENSE

16. At the time of the purported vesting there did not and at the present time there does not exist any obligation on the part of either the Cities Service Company or the Chase National Bank (1) to issue a new debenture or

coupons in lieu of Debenture No M 7029 or its unpaid 73
coupons or (2) to pay the amount of Debenture No. M 23318 or Debenture No. M 7029 or interest thereon or unpaid coupons thereof, except upon presentation and surrender thereof or satisfactory evidence of loss, destruction or mutilation thereof together with adequate indemnity. Vesting Order No. 12960 purported to and could vest only existing obligations.

17. Debenture No. M 23318 was issued under the Indenture dated as of June 2, 1930, between the defendant Cities Service Company and The Chase National Bank of the 74
City of New York, as Trustee, which contains a specification of the rights thereunder of the debenture holders and the Trustee. Debenture No. M 7029 was issued under the Indenture dated as of March 1, 1929 between defendant Cities Service Company and The Equitable Trust Company of New York, as Trustee, which contains a specification of the rights thereunder of the debenture holders and the Trustee. The Chase National Bank of the City of New York has succeeded the Equitable as Trustee under the above-mentioned Indenture dated as of March 1, 1929.

18. Debentures Nos. M 23318 and M 7029 were negoti- 75
able bearer instruments and as such require payment only to the bearer thereof. The debentures expressly provided for the payment of interest thereon only upon presentation and surrender of coupons thereto attached. Each coupon attached to each of the above-mentioned debentures required payment only to the bearer thereof upon surrender of the coupon.

19. The debentures issued under the Indenture dated as of June 2, 1930, including Debenture No. M 23318, were

76 called for redemption prior to the issuance of Vesting Order No. 12960; and the Chase National Bank is now holding, as Trustee, funds for the purpose of paying the redemption value of such debentures called for redemption as are still outstanding, as and when they are presented to it for payment in accordance with the Indenture. Article IV, Section 3 of the Indenture, provides with reference thereto:

"* * * All moneys deposited by the Company with the Trustee for redemption of Debentures under the pro-
77 visions of this Article, shall be received for account of the holders of the Debentures to be redeemed and shall be paid to them, respectively, upon the presentation and surrender of their Debentures with all unmatured coupons appertaining thereto. * * * All Debentures so surrendered for redemption and all coupons thereto appertaining shall be forthwith cancelled and shall thereafter be cremated by the Trustee, which shall deliver its certificate thereof to the Company; and no Debentures shall be issued in lieu thereof."

The Indenture dated as of June 2, 1930, does not authorize
78 or provide for payment of any coupons except upon presentation and surrender thereof. Plaintiff has not presented or surrendered or offered to present or surrender Debenture No. M 23318 or any coupons appertaining thereto, and under the terms of the aforementioned Indenture is not entitled to receive an amount representing the proceeds of redemption of the aforementioned debenture or interest thereon or the amount of any coupons thereof.

20. Debenture M 7029, due in 1969, issued under the Indenture dated as of March 1, 1929, had not been called for

redemption at the time of the issuance or publication of Vesting Order No. 12960. Under that Indenture, the Trustee is authorized to authenticate and deliver additional debentures in only two classes of cases: (1) under Article II, Section 1, if the aggregate principal amount of Debentures authorized under the Indenture has not already been authenticated and delivered, or (2) under Article II, Section 9, upon receipt by the Company and the Trustee of evidence satisfactory to both of them that any outstanding Debenture has been mutilated, destroyed, lost or stolen, and of indemnity satisfactory to both of them. The aggregate amount of debentures authorized under the Indenture dated as of March 1, 1929 has already been authenticated and delivered. The plaintiff has not claimed that Debenture No. M 7029 has been mutilated, destroyed, lost or stolen nor has it offered any evidence of such mutilation, destruction, loss or theft, or any indemnity. Neither the defendant The Chase National Bank of the City of New York nor defendant Cities Service Company has authority under the terms of the aforementioned Indenture to cancel Bond No. M 7029 on its books or to issue a new bond in lieu thereof either with or without affixing thereto a number of coupons equal to the number not paid prior to March 28, 1949.

21. No provision is made under the Indenture dated as of March 1, 1929, for the payment of an amount representing the proceeds of redemption for a bearer debenture issued thereunder, or for payment of interest thereon, or for payment of unpaid coupons thereof, without presentation and surrender of such debenture and such unpaid coupons. Plaintiff has not presented or surrendered or offered to present or surrender Debenture No. M 7029 or any of the

82 unpaid coupons thereof, and under the terms of the aforementioned Indenture is not entitled to receive the proceeds of redemption for that debenture or interest thereon or the amount of any coupons thereof.

WHEREFORE, the defendant, The Chase National Bank of the City of New York prays judgment dismissing the complaint.

MILBANK, TWEED, HOPE & HADLEY,

By TIMOTHY N. PFEIFFER,

83 a partner

Attorneys for defendant
The Chase National Bank of the
City of New York

84

Answer of Cities Service Company

85

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CIV. 55-262

[SAME TITLE]

Defendant, CITIES SERVICE COMPANY, by its attorneys Frueauff, Burns, Ruch & Farrell, answering the complaint in this action:

86

1. Admits the allegations of paragraph 1 of the complaint.

2. With reference to the allegations of paragraph 2 of the complaint, admits that defendant, Cities Service Company, is and has been at all times material hereto a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and has a place of business in New York, New York within this district; but denies that the principal place of business of Cities Service Company is in New York, New York.

87

3. Admits the allegations of paragraph 3 of the complaint.

4. With reference to the allegations of paragraph 4 of the complaint, admits that a purported Vesting Order No. 12960, a copy of which is attached to the complaint as Exhibit A, was issued and published as alleged; but denies that the Vesting Order was valid and effective; and denies that it vested debts or obligations evidenced by Cities

88 Service Company's 5% Gold Debenture Bearer Bonds Nos. M 23293, M 23393, M 23318 and M 7029, or any of them; and further denies that any debt or obligation evidenced by Debenture No. M 23293 or its coupons, or any other right thereunder existed at the time of the purported vesting or now exists, except any debt or obligation represented by eight unpaid coupons which matured between December, 1940, and June, 1944.

5. Admits that the debentures numbered M 23293 and M 23318 were authenticated and delivered under an In-
89 denture dated as of June 2, 1930 between the defendants, Cities Service Company and The Chase National Bank of the City of New York, as trustee, and that said debenture numbered M 23318 has been called for redemption and defendant, The Chase National Bank, as trustee, is holding funds for the purpose of paying the redemption value of said debenture numbered M 23318; but denies that defendant The Chase National Bank, as trustee, is holding funds for the purpose of paying the redemption value of said debenture numbered M 23293.

6. Admits the allegations of paragraph 6 of the
90 complaint.

7. Admits the allegations of paragraph 7 of the complaint.

8. With reference to the allegations of paragraph 8, admits the sending and receipt of the letters, copies of which were annexed as Exhibits C and D to the complaint, but denies that the plaintiff thereby effectively authorized or could authorize the actions therein called for and

denies that plaintiff has made proper demand for the possession of the property attempted to be vested. 91

9. Denies having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 of the complaint except as herein stated. Defendant, Cities Service Company, admits that it has not complied with plaintiff's demand as set forth in paragraph 8 of the complaint.

10. With reference to the allegations of paragraph 10, admits that the debenture numbered M 23293 is not in the possession of the plaintiff; but denies having knowledge or information sufficient to form a belief as to the truth of the allegations that the debentures numbered M 23318 and M 7029 are not in the possession of the plaintiff, and are not obtainable by the plaintiff. 92

11. Denies having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11 of the complaint.

WHEREFORE, the defendant, Cities Service Company, demands judgments dismissing the complaint in this action. 93

Dated: New York, N. Y.
March 13, 1950.

FRUEAUFF, BURNS, RUCH & FARRELL

By B. M. SHANLEY 2ND
A Member of the Firm

Attorneys for the Defendant
Cities Service Company
60 Wall Street
New York 5, N. Y.

Stipulation of Facts

94

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. 55-262

[SAME TITLE]

It is hereby stipulated and agreed that no claim is to
95 be made in this action with respect to Debenture No. M 23293 or its coupons or the obligation represented thereby, the said debenture having been paid prior to the issuance of Vesting Order No. 12960, and the Complaint in this action is to be treated as amended accordingly.

The following facts are likewise stipulated and agreed to for the purposes of this action:

1. Debenture No. M 7029 was presented for redemption at the offices of the Chase National Bank in New York by Fiduciary Trust Company of New York on behalf of Globe & Rutgers Fire Insurance Company on January 5,
96 1950. The following legend was then typed on the debenture:

> Vesting Order No. 12960 has purported to vest in the Attorney General of the United States the obligation evidenced by this Debenture, with all rights in, to and under this Debenture.
>
> Federal Register, March 29, 1949, page 1405

The Chase National Bank of the City of New York, 97
Trustee

By D. P. STEWART (Signed)
Corporate Trust Officer

Subsequently, purportedly under the rules of the New York Curb Exchange, the Debenture was returned to Dominick & Dominick, a brokerage firm located in New York City, against replacement of a new bond or the purchase price, and the Debenture is now in the possession of that firm.

98

2. The present whereabouts of Debenture No. M 23318, last reported in Berlin, are unknown. In response to an official inquiry from the Branch Office of the Office of Alien Property in Germany, the Deutsche Bank, located in the Soviet Sector of Berlin, by letter dated May 19, 1949, advised that the Cities Service Company 5% Gold Debenture Bearer Bonds Nos. M 23293, M 23318 and M 7029 had been seized and transferred by the local occupying authorities and that, therefore, the debentures were not at present at their disposal. A copy of the communication is attached as Exhibit 1. Information in the 99
possession of the Government indicates that the Debentures had been held in the Russian Sector of Berlin prior to the issuance of Vesting Order No. 12960 and that the seizure by the occupying authorities occurred prior to the issuance of the Vesting Order.

3. A copy of the Indenture dated as of March 1, 1929, under which Debenture No. M 7029 was authenticated and delivered, and a copy of the Indenture dated as of June 2, 1930, under which the Debenture No. M 23318 was

100 authenticated and delivered, are available, and provisions thereof may be referred to or, if the court desires, copies will be presented to it.

4. Debentures Nos. M 7029 and M 23318 are negotiable bearer instruments.

5. Photostats of sample instruments issued under the above-mentioned indentures are attached as Exhibits 2 and 3.

101 Dated: May 25, 1950.

IRVING H. SAYPOL
Attorney for Plaintiff

FRUEAUFF, BURNS, RUCH & FARRELL
Attorneys for Cities Service Company

MILBANK, TWEED, HOPE & HADLEY
Attorneys for The Chase National Bank of the City of New York

102

EXHIBIT "1" ANNEXED TO STIPULATION OF FACTS

103

Deutsche Bank
Berlin W.30 Viktoria-Luise-Platz 9
Cable Address: DEUTSTADT
Telephone: 242627

Reichsbank-Giro-Acct:
Berlin 1/701

Postal Acct: Berlin West
No. 25363

United States
Department of Justice, Overseas Branch
Munich 27—Mauerkircherstr. 59

104

In reply please refer to:
Depotabt. L/Re.

Your letter:
April 29, 1949

Your reference:
Berlin W30:HL:RVP:EAJ:cn May 19, 1949

Subject:
Adline von Campenhausen, Wehrda-Haenfeld/Hessen
MGAZ—Depot no. 523/01750 Deutsche Bank Branch Heidelberg

105

Town—Office under BKO (45) 3.

Upon your request we want to inform you that the following items referred to by you in your letter,

$2,000 5% Cities Service Comp. Gold Dbt.
per June 1, 1950 J/D M 23318, M 23293

Exhibit "1" Annexed to Stipulation of Facts

106 $1,000 5% dtc. per March 1, 1969 M/S M 7029

—both items not shares (Aktien)—

cannot be photostated as these securities together with others deposited in our vaults have been seized and transferred by the local occupying authorities. These debentures, therefore, are at present not at our disposal.

Truly yours,

DEUTSCHE BANK

107 (signatures illegible)

1 108

Notice of Motion of Plaintiff for Judgment on the Pleadings or for Summary Judgment 109

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. 55-262

[SAME TITLE]

To: 110

Frueauff, Burns, Ruch & Farrell
60 Wall Street
New York 5, New York

Milbank, Tweed, Hope & Hadley
15 Broad Street
New York 5, New York

SIRS:

PLEASE TAKE NOTICE THAT at a motion term of this Court, to be held in Room 506, United States Courthouse, Foley Square, New York, New York, on the thirteenth day of June, 1950, at ten thirty in the forenoon, or as soon thereafter as counsel may be heard, plaintiff will move the Court: 111

1. For judgment on the pleadings pursuant to Rule 12 of the Federal Rules of Civil Procedure; or

2. For a summary judgment in plaintiff's favor pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the ground that there is no genuine issue as to any material

Notice of Motion of Plaintiff for Judgment on the Pleadings or for Summary Judgment

112

fact, and that plaintiff is entitled to a judgment as a matter of law.

The motion for summary judgment is based upon

(a) The pleadings,

(b) The stipulation between the attorneys for the parties.

Dated: May 25, 1950.

113

IRVING H. SAYPOL,
United States Attorney for the Southern District of New York

114

Notice of Motion of Chase National Bank for Judgment Dismissing the Complaint or for Summary Judgment 115

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 55-262

[SAME TITLE]

PLEASE TAKE NOTICE that the plaintiff having served notice that it will move this Court at a Motion Term thereof to 116
be held in Room 506, United States Court House, Foley Square, New York, N. Y., on the 13th day of June, 1950, at 10:30 A. M. or as soon thereafter as counsel can be heard for judgment on the pleadings or for summary judgment, the defendant The Chase National Bank will make a cross motion at the same time and place:

1. On the pleadings for judgment thereon dismissing the complaint pursuant to Rule 12(c) of the Federal Rules of Civil Procedure on the grounds that the complaint fails to state a claim upon which relief can be granted, that indis- 117
pensable parties have not been joined and that the defenses stated in the answer of the defendant The Chase National Bank are complete and sufficient as a matter of law; or in the alternative

2. On the pleadings herein and the stipulation between the attorneys for the parties for summary judgment in favor of the defendants pursuant to Rule 56 of the Federal Rules of Civil Procedure on the grounds that the plaintiff has failed to establish a proper basis for relief, that indis-

Notice of Motion of Chase National Bank for Judgment Dismissing the Complaint or for Summary Judgment

18

pensable parties have not been joined, and that no material fact is in issue necessary to establish that the defenses stated in the answer of the defendant The Chase National Bank are sufficient as a matter of law.

Dated: New York, N. Y., June 1, 1950.

MILBANK, TWEED, HOPE & HADLEY
By TIMOTHY N. PFEIFFER
a partner

19

Attorneys for defendant The Chase National Bank of the City of New York.

To:

IRVING H. SAYPOL,
United States Attorney for the Southern District of New York,
Attorney for the plaintiff,
United States Court House,
Foley Square,
New York, N. Y.

20

FRUEAUFF, BURNS, RUCH & FARRELL,
Attorneys for defendant Cities Service Company,
60 Wall Street,
New York 5, N. Y.

Notice of Motion for Cities Service Company for Judgment Dismissing the Complaint or for Summary Judgment

121

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

PLEASE TAKE NOTICE that the plaintiff having served notice that it will move this Court at a Motion Term thereof to be held in Room 506, United States Court House, Foley Square, New ~~York,~~ N. Y., on the 13th day of June, 1950, at 10:30 A. M. or as soon thereafter as counsel can be heard for judgment on the pleadings or for summary judgment, the defendant Cities Service Company will make a cross motion at the same time and place:

122

1. On the pleadings for judgment thereon dismissing the complaint pursuant to Rule 12(c) of the Federal Rules of Civil Procedure on the ground that the complaint fails to state a claim upon which relief can be granted, that indispensable parties have not been joined and that the defenses stated in the answer of the defendant Cities Service Company are complete and sufficient as a matter of law; or in the alternative

123

2. On the pleadings herein and the stipulation between the attorneys for the parties for summary judgment in favor of the defendants pursuant to Rule 56 of the Federal Rules of Civil Procedure on the ground that the plaintiff

Notice of Motion of Cities Service Company for Judgment Dismissing the Complaint or for Summary Judgment

124 has failed to establish a proper basis for relief, that indispensable parties have not been joined, and that no material fact is in issue necessary to establish that the defenses stated in the answer of the defendant Cities Service Company are sufficient as a matter of law.

Dated: New York, N. Y., June 6, 1950.

FRUEAUFF, BURNS, RUCH & FARRELL

By B. M. SHANLEY 2ND

125 a partner

Attorneys for defendant Cities Service Company.

To:

IRVING H. SAYPOL,
United States Attorney for the Southern District of New York,
Attorney for the plaintiff,
United States Court House,
Foley Square,
New York, N. Y.

126

MILBANK, TWEED, HOPE & HADLEY
Attorneys for defendant The Chase National Bank of the City of New York,
15 Broad Street,
New York 5, N. Y.

Opinion of McGohey, *D.J.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 55-262

[SAME TITLE]

Appearances:

IRVING H. SAYPOL
United States Attorney for the Southern District of New York,
Attorney for Plaintiff

By: James A. Devlin
Assistant United States Attorney

George B. Searls
Edward J. Friedlander
Attorneys, Office of Alien Property
Department of Justice,
Washington 25, D. C.

MILBANK, TWEED, HOPE & HADLEY
Attorneys for The Chase National Bank of the City of New York

By: Timothy N. Pfeiffer

15 Broad Street
New York 5, New York

FRUEAUFF, BURNS, RUCH & FARRELL
Attorneys for Cities Service Company
60 Wall Street
New York 5, New York

130 McGOHEY, *D.J.*

Each party moves either for judgment on the pleadings or for summary judgment. There appears to be no issue between the parties as to any material fact.

Vesting Order 12960, executed March 11, 1949, vested in the Attorney General as successor to the Alien Property Custodian as "property within the United States owned or controlled by, payable or deliverable to, held on behalf of or on account of, or owing to, or which is evidence of ownership or control by, Adline von Campenhausen" an
131 enemy alien

a. That certain debt or other obligation, matured or unmatured, evidenced by two (2) Cities Service Company 5% Gold Debentures Bearer Bonds, of $1,000 face value each, bearing the numbers M 23293 and M 23318, and any and all rights to demand, enforce and collect the aforesaid debt or other obligation, together with any and all rights of redemption, and,

b. That certain debt or other obligation, matured or unmatured, evidenced by one (1) Cities Service Company 5% Gold Debenture Bearer Bond, of $1,000
132 face value, bearing the number M 7029, and all rights to demand, enforce and collect the aforesaid debt or other obligation, together with any and all rights in, to and under said bond.

On January 5, 1950, after some previous correspondence, the Office of Alien Property authorized and directed defendant Cities Service Company to cancel bonds M 23293 and M 23318 and to issue to the Attorney General in lieu thereof its check representing the proceeds of redemption

with accrued interest. These two bonds had been called 133
for redemption prior to the issuance of the Vesting Order. Cities Service Company was also authorized and directed to cancel bond M 7029 and to issue to the Attorney General a new bond of the same series for the same face value and having affixed thereto the number of coupons corresponding to the unredeemed coupons affixed to M 7029, or, alternatively, to issue a check for the redemption price and accrued interest. This bond matures in 1969.

This action was brought January 30, 1950, to enforce the above demands. Defendant Chase National Bank is 134
the present trustee under the indentures under which the bonds were issued.

The parties have stipulated that no claim is to be made with regard to M 23293 because it was paid prior to the issuance of the Vesting Order. M 7029 was presented for redemption in New York by Fiduciary Trust Company of New York on behalf of Globe & Rutgers Fire Insurance Company on January 5, 1950. It was not redeemed. A notation of the issuance of the Vesting Order was made on the debenture and it was then returned to Fiduciary Trust Company. It is now apparently in the possession of a New York brokerage firm. The parties have stipulated 135
that

> The present whereabouts of Debenture No. M 23318, last reported in Berlin, are unknown. In response to an official inquiry from the Branch Office of the Office of Alien Property in Germany, the Deutsche Bank, located in the Soviet Sector of Berlin, by letter dated May 19, 1949, advised that * * * M 23293, M 23318 and

136 M 7029 had been seized and transferred by the local occupying authorities and that, therefore, the debentures were not at present at their disposal. * * * Information in the possession of the Government indicates that the Debentures had been held in the Russian Sector of Berlin prior to the issuance of Vesting Order No. 12960 and that the seizure by the occupying authorities occurred prior to the issuance of the Vesting Order.

The Trading with the Enemy Act §5(b)(1) authorizes
137 the vesting of alien property "subject to the jurisdiction of the United States." Executive Order 9095 §2(c), as amended, issued by authority of the Trading with the Enemy Act, authorizes the Alien Property Custodian to vest property "within the United States." The Government does not contend that the certificates were within or subject to the jurisdiction of the United States. Its position, as indicated by the Order's description of the property sought to be vested, is that the certificates are to be distinguished from the "debt or other obligation" and that, though the certificates were abroad, the "debt or other obligation" was within or subject to the jurisdic-
138 tion of the United States and so could be vested.

The question whether in these circumstances there existed at the time of the issuance of the Vesting Order a "debt or other obligation" within or subject to the jurisdiction of the United States turns on the nature of these negotiable bearer bonds.[1]

---

1 The parties have stipulated that they are negotiable bearer bonds.

"Bonds have never been considered only as evidences of obligation; from the earliest times they have been treated as the very obligations, and that notion persists." [2]

The restatement of Conflict of Laws §52, comment *a* declares: "A negotiable instrument is a document embodying a right; and the state which has jurisdiction of the document has jurisdiction of the right." The illustration thereunder seems precisely in point here: "A negotiable promissory note for the payment of $100 is made in state X by A, payable in the same state to B. B indorses the note to a bank, which holds it in its vaults in state Y. The obligation embodied in the note is subject to the jurisdiction of Y." Under this principle it would seem clear that the "debt or other obligation" sought to be reached by the Vesting Order was not within or subject to the jurisdiction of the United States.

The United States Treasury Department takes the same view in the analogous problem of taxation of estates of non-resident aliens. Regulation 105, §81.50 provides: "Real estate, tangible personal property, and the written evidence of intangible personal property which is treated as being the property itself are within the United States if physically situated therein. For example, a bond for the payment of money is not within the United States unless physically situated therein."

The Trading with the Enemy Act and Executive Order 9095 purport to be concerned not with all property any-

---

2 L. Hand, *C.J.* in *Bozant* v. *Bank of New York*, 2 Cir., 156 F. 2d 787, 790; citing *Bacon* v. *Hooker*, 177 Mass. 335, 337, 58 N. E. 1078; *Blackstone* v. *Miller*, 188 U. S. 189, 206 (Holmes, *J.*: "Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it. * * *"); *United States Fidelity & Guaranty Co.* v. *Kiefler*, 239 U. S. 17, 25. See, 6 Williston, Contracts 5311 (Rev. Ed.).

142 where, but only with property "subject to the jurisdiction of the United States" or "within the United States." Vesting Order 12960 attempts to reach a "debt or other obligation" which is not within or subject to the jurisdiction of the United States. It is, therefore, without the authority of the Executive Order and the Act, and, consequently the defendants must have summary judgment.

Because of the view I have taken I do not come to a consideration of the other questions raised by the parties.

Settle order on notice.

143 Dated, New York, N. Y., October 24, 1950

JOHN F. X. McGOHEY
U. S. D. J.

144

Order and Judgment Appealed From

145

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 55-262

[SAME TITLE]

Plaintiff having moved this Court for judgment on the pleadings herein pursuant to Rule 12 of the Rules of 146
Civil Procedure or for summary judgment pursuant to Rule 56, and each of the defendants having made a cross motion for judgment on the pleadings pursuant to Rule 12(c) or in the alternative for summary judgment pursuant to Rule 56, and said motions having duly come on to be heard on June 15, 1950, and plaintiff having appeared by Irving H. Saypol (George B. Searls and Edward J. Friedlander, of counsel), his attorney, and defendant Cities Service Company having appeared by Frueauff, Burns, Ruch & Farrell (Albert R. George, of counsel), its attorneys, and defendant The Chase National Bank of the City of New York having appeared by Milbank, Tweed, Hope & 147
Hadley (Timothy N. Pfeiffer and Rebecca M. Cutler, of counsel), its attorneys, and the Court having considered the complaint and answers herein and the stipulation among attorneys for the parties dated May 25, 1950, and having heard oral arguments, and due deliberation having been had thereon, and the Court having found there is no issue as to any material fact and having concluded that the defendants are entitled to judgment as a matter of law, and having rendered and filed its written opinion on October 25, 1950;

148 Now, on motion of Milbank, Tweed, Hope & Hadley, attorneys for defendant The Chase National Bank of the City of New York, and Frueauff, Burns, Ruch and Farrell, attorneys for defendant Cities Service Company, it is hereby

ORDERED that the motion of each of said defendants for summary judgment be and the same hereby is granted; and it is further

ORDERED that the motion of the plaintiff for judgment
149 on the pleadings or for summary judgment be in all respects denied; and it is further

ORDERED AND ADJUDGED that the complaint herein be and the same hereby is dismissed on the merits.

Dated: November 6, 1950.

JOHN F. X. McGOHEY
United States District Judge

Judgment Entered

150 WILLIAM V. CONNELL
Clerk

November 8, 1950

U. S. District Court
Filed 11:20 A. M.
November 8, 1950
S. D. of N. Y.

Notice of Appeal

151

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. 55-262

J. HOWARD MCGRATH, Attorney General, as Successor to the Alien Property Custodian,

Plaintiff,

—v.—

152

CITIES SERVICE COMPANY,

and

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,

Defendants.

SIRS:

Notice is hereby given that J. Howard McGrath, plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit, from the final order and judgment, dated November 6, 1950, and entered herein on November 8, 1950.

153

Dated: New York, N. Y., December 6, 1950.

Notice of Appeal

154

Yours, etc.

IRVING H. SAYPOL
United States Attorney for the
Southern District of New York
United States Court House
New York, New York

HAROLD I. BAYNTON
Assistant Attorney General
Department of Justice
155 Washington, D. C.

Attorneys for Plaintiff

MILBANK, TWEED, HOPE & HADLEY
Attorneys for The Chase National Bank
of the City of New York
15 Broad Street
New York 5, New York

FRUEAUFF, BURNS, RUCH & FARRELL
Attorneys for Cities Service Company
60 Wall Street
156 New York 5, New York

CLERK OF THE UNITED STATES DISTRICT COURT
Southern District of New York
United States Court House
Foley Square
New York, New York

Stipulation as to Designation of Contents of Record on Appeal

157

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 55-262

[SAME TITLE]

IT IS HEREBY STIPULATED, AGREED and CONSENTED TO by and between the attorneys for the respective parties hereto that the following shall constitute the contents of the record on appeal herein: 158

1. Complaint of J. Howard McGrath, Attorney General, as successor to the Alien Property Custodian, and Exhibits A to D, both inclusive, annexed thereto:

2. Answer of defendant, The Chase National Bank of the City of New York;

3. Answer of defendant, Cities Service Company;

4. Stipulation of counsel for the parties, dated May 25, 1950, and Exhibits 1 to 3, both inclusive, annexed thereto; 159

5. Notice of Motion of plaintiff for judgment on the pleadings or, in the alternative, for summary judgment;

6. Notice of Motion of defendant, The Chase National Bank of the City of New York, for judgment on the pleadings or, in the alternative, for summary judgment;

7. Notice of Motion of defendant, Cities Service Company, for judgment on the pleadings or, in the alternative, for summary judgment;

Stipulation as to Designation of Contents of Record on Appeal

160

8. Opinion of District Judge John F. X. McGohey, dated October 24, 1950;

9. Final Order and Judgment, dated November 6, 1950, and entered November 8, 1950;

10. Notice of Appeal of plaintiff with date of filing;

11. This Stipulation.

Dated: New York, N. Y., December 6, 1950.

161

IRVING H. SAYPOL,
United States Attorney for the Southern District of New York, Attorney for Plaintiff,
United States Court House,
New York, New York.

MILBANK, TWEED, HOPE & HADLEY,
Attorneys for the Chase National Bank of the City of New York,
15 Broad Street,
New York 5, New York.

162

FRUEAUFF, BURNS, RUCH & FARRELL,
Attorneys for Cities Service Company,
60 Wall Street,
New York 5, New York.

Filed Dec. 6, 1950

[fol. 55] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1950

No. 235

(Argued May 2, 1951. Decided June 13, 1951)

Docket No. 21925

J. HOWARD MCGRATH, Attorney-General, Appellant,

v.

CITIES SERVICE COMPANY and CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Appellees

Before Chase, Frank and L. Hand, Circuit Judges

Appeal from a judgment of the District Court for the Southern District of New York, summarily dismissing the complaint in an action by the Attorney-General, as Alien Property Custodian, upon three negotiable bonds, "vested" in him under the Trading with the Enemy Act.*

George B. Searls for the appellant.
William M. Evarts for the appellees.

[fol. 56] L. HAND, Circuit Judge:

This is an appeal from a judgment summarily dismissing the complaint of the Attorney-General as substituted owner of three negotiable bonds, payable to bearer, against the Cities Service Company, the obligor, and the Chase National Bank of New York, the "indenture trustee." The plaintiff claimed to have become the obligee of the bonds by virtue of a "vesting" order, issued by him as Alien Property Custodian under § 7 (c) and § 5 (b) of the Trading with the Enemy Act;* and the only issue is whether upon the conceded facts he is right. Of the original three bonds one had been paid before the "vesting order" was made, and of the remaining two, one has come into the hands of brokers in New York who are holding it for an American insurance company, and the whereabouts of the other is wholly unknown. At some undisclosed time a

* §§ 7 (c) and 5 (b), Title 50, War Appendix.

German citizen became the owner of all three bonds, from whom "the occupying authorities" of the "Russian Sector of Berlin" had seized them before March 11, 1949, the day of the "vesting order." Each party moved for summary judgment, and the judge held that the order did not "vest" the bonds in the plaintiff because, since bonds were outside the United States when "vested," they were as much beyond the power of the Alien Property Custodian as chattels situated in Germany. That is also the defendants' argument on this appeal: they say that the Act is limited to property within the United States and that as the actual instruments were not in this country, and were not mere evidences of the debt, but the very debt itself, they were not "within the United States," and subject to seizure. Further, they argue that, if we hold that the Act covered such debts, they will not be adequately protected from [fol. 57] future suits by possible bona fide holders, which place them in a position of very grave doubt constitutionally.

As to the defendants' first objection, we have no doubt that the Act applies to bonds issued by a citizen of the United States and held by an alien outside the country. That it meant to cover debts or obligations owed to aliens —including bonds—appears in several places. Thus § 7 (c) says that: "if the President shall so require, any money or other property including * * * choses in action, and rights and claims of every character and description owing or belonging to * * * an enemy * * * shall be * * * paid over to the Alien Property Custodian, or * * * may be seized" by him. Again, § 7 (e) declares that "in case of payment to the Alien Property Custodian of any debt or obligation owed to an enemy," he shall have power to execute a valid discharge and shall "deliver up any notes, bonds or other evidences of indebtedness or obligation * * * that may have come into" his "possession." Finally, § 9 (n) declares that: "in the case of property consisting * * * of bonded or other indebtedness, evidenced * * * by bonds * * * where the right, title and interest in the property (but not the actual * * * bond * * *) was conveyed, transferred, assigned, delivered or paid to the Alien Property Custodian, or seized by him," the true owner may be indemnified, as provided in § 9 (b).

As we understand the defendants' objection it is further that, even though the intent of the Act was to make all

debts and choses in action, including bonds, subject to seizure, it was *brutum fulmen* as to bonds which are outside the United States at the time of "vesting," just as it is as to chattels so situated.* It is the bond, the document itself, which constitutes the debt, and whose location determines its "situs," regardless of the residence of the obligor [fol. 58] and the power over him of the state where that residence may be. It is true that for centuries it was the English law that sealed instruments of any kind—bonds among them—could not be sued on without "profert" of the original. The obligor was entitled to "crave oyer," and judgment for the obligee was conditional upon his compliance. It followed that, if the obligee lost the instrument, or if it were mutilated, he could not sue. Equity soon intervened and in 1804 Lord Elden was able to say: "The jurisdiction of this Court upon lost bonds is very ancient: founded upon a notion, acknowledged until a very late period, that there was no remedy at law upon a lost bond, as you could not make Profert." * The courts of law had already followed suit, though not until 1789; ** but equity still retained its jurisdiction; † and the equitable remedy certainly became a part of the general law of this country.†† Whether this archaic doctrine depended upon some mythical identification of the legal relation between the parties with the document is not important, even were we compelled to recognize it; the intervention of equity has dispelled it as a precedent, and in any event it is too patently a confusion of the legal rights and duties involved to constitute a bar to the constitutional powers of any state. Of itself a document—whether a deed, a bond, or any other sealed instrument—obviously is, and can be, nothing more than a piece of parchment or paper. Even though it were only when equipped with the document, that the obligee could invoke against the obligor the sanctions which the law provided, the obligation always consisted, and could only [fol. 59] consist of the power the law gave him to invoke

---

* *Frick* v. *Pennsylvania*, 268 U. S. 473.

* *East Indian Company* v. *Boddam*, 9 Ves. Jr. 464, 466.

** *Read* v. *Brookman*, 3 Term Rep. 151.

† *Atkinson* v. *Leonard*, 3 Brown's Ch. Cas. 218.

†† *Midkiff* v. *Cotton*, 252 Fed. Rep. 420 (C. C. A. 4); *Prescott* v. *Williamsport & N. B. R. Co.*, 159 Fed. Rep. 244.

those sanctions to coerce the obligor, and that was equally true even while possession of the document was a condition upon that power. Moreover, even if that had not been true, as soon as equity dispensed with that condition there remained no difference between a bond and any other "chose in action," which could affect the constitutional power of a state over the obligor. *Blackstone* v. *Miller*, 188 U. S. 189, 205, 206, remains, though after a somewhat checkered history,* the simplest statement of the situation: "What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay. It does not matter that the law would not need to be invoked in the particular case. * * * Power over the person of the debtor confers jurisdiction, we repeat." It is true that Holmes, *J.*, did then go on to distinguish "State Tax on Foreign Held Bonds," 15 Wall. 300, on the ground that bonds had there been involved, and that in such cases "the debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions," p. 206. We agree that that gives color to the defendants' position; yet with deference we read that language as no more than a way of avoiding a precedent which the court had decided to overrule. Furthermore, the distinction was altogether gratuitous, for in "State Tax on Foreign Held Bonds," *supra*, the court did not even intimate that it was a reason for the result; on the contrary it repeatedly spoke in language which would have held the tax invalid had it been imposed upon any kind of chose in action. The notion was that the "situs"—a word most destructive when [fol. 60] used in this connection—was the residence of the obligee. For the foregoing reasons we hold that the Act meant to authorize the seizure of the obligation "evidenced"—we use that word deliberately—by bonds outside the country, as well as any of other alien held choses in action; and that as an incident to his seizure the Alien Property Custodian may sue upon such a bond as surrogate of the holder. There remains the question whether the exercise of such a power raises any constitutional doubts, as the defendants insist.

---

* *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204; *State Tax Commission* v. *Aldrich*, 316 U. S. 174; *Standard Oil Co.* v. *New Jersey*, 341 U. S.

Their argument can be most forcibly stated as follows. Although the statute affects to discharge an obligor whom the Alien Property Custodian has compelled to pay the bond—§ 5 (b) (2) and § 7 (c)—and, although the statute may be a complete protection against suits brought later in any court of the United States by a bona fide holder of the bonds, it does not follow that it will be a good discharge in the court of a foreign state. Both defendants at bar are especially exposed to such suits: the Cities Service Corporation owns tankers that enter ports all over the world, and they will be constantly exposed to attachment or other proceedings *in rem;* the Chase Bank has a number of offices in Europe with assets similarly vulnerable; and it is to the last degree uncertain whether a foreign court, indeed any foreign court, will accept payment to the Alien Property Custodian as a valid discharge of the debt, and a defence to the suit. We recognize the force of this reasoning, and we shall assume for argument that, if it were true that the defendants remain exposed to such a recovery, and will have no consequent claim against the Treasury for recoupment, a judgment against them will "take" their property without compensation in violation of the Fifth Amendment. Upon that hypothesis the case therefore turns upon whether they will have such a claim, if they are later forced to pay a bona fide holder.

[fo. 61] We are satisfied that they will have. The Supreme Court in a long line of decisions which we cite in the margin has settled it that, when the United States "takes" property for a public purpose, an implied promise arises to pay compensation to the owner, even though no statute so provided.* All the conditions on which that doctrine depends will exist, if a bondholder succeeds in recovering

---

* *United States* v. *Great Falls M'f'g Co.*, 112 U. S. 645; *Great Falls M'f'g Co.* v. *Attorney General*, 124 U. S. 581; *United States* v. *Lynah*, 188 U. S. 445, 465; *Tempel* v. *United States*, 248 U. S. 121; *United States* v. *North American Co.*, 253 U. S. 330, 333; *Campbell* v. *United States*, 266 U. S. 368, 370, 371; *Phelps* v. *United States*, 274 U. S. 341, 343, 344; *International Paper Co.* v. *United States*, 282 U. S. 399, 407; *Hurley* v. *Kincaid*, 285 U. S. 95; *Yearsley* v. *Ross Construction Co.*, 309 U. S. 18, 21; *United States* v. *Causby*, 328 U. S. 256.

from the defendants in a foreign court, after the plaintiff has recovered here. The obligor has of course consented to the "taking" of his property by the promisee; and to the sanctions that may be necessary to overcome his resistance. Moreover, in the case of a negotiable instrument, like the bonds at bar, the promisee is the holder; but the Alien Property Custodian by hypothesis is not the holder. When he compels the obligor to pay him, he "takes" the obligor's property in the constitutional sense; he totally deprives the obligor of what he collects, and he does so in execution of a public purpose of the United States. The obligor must be entitled to "just compensation" for his loss in one form or another, if that "taking" is to be valid. If the Act could give the obligor a discharge that protected him against any recovery by the promisee—the holder—that would be "just compensation"; and that is what the Act—§ 5 (b) (2) and § 7 (e)—does attempt to do and is effective to do in any court of the United States; but by hypothesis it may not be a discharge in a foreign court. To complete that "just compen-[fol. 62] sation" which in one form or another he must have, the obligor must acquire the power to recoup himself out of the Treasury. For these reasons it appears that all the conditions are realized on which the doctrine in question depends.

Indeed the question was really concluded by the decision of the Supreme Court in *Silesian-American Corporation* v. *Clark*, 332 U. S. 469, where the interest of certain Swiss banks was at stake, which were pledgees of shares of stock in a domestic corporation. The Alien Property Custodian had seized these shares because the owners, the pledgors, were enemy aliens; and he demanded that the corporation should issue shares to him in substitution for those seized. The corporation objected. It argued that, if the pledgees demanded recognition of their rights, the discharge granted it by the Act would not protect it; because, although the Act allowed the pledgees' interest to be seized, it gave them no recourse to the Treasury. Moreover, if the pledgees had no such recourse, their property could not lawfully be taken from them, from which it would follow that they could compel the corporation to issue shares to them as well as to the Alien Property Custodian. This was a sound argument because by the amendment of § 5(b) in 1941 the Alien Property Custodian got power to seize and sequestrate the property of a foreign alien who was not an enemy—§ 5(b)

(1)—yet § 9(a) gave relief only to a person who could "establish" an "interest" in the property, and in the case there at bar the interest of the foreign pledgees had been "vested" in the Alien Property Custodian. Moreover, since the property of friendly foreign nationals is protected by the Fifth Amendment, it followed that the seizure—the "taking"—was unconstitutional, unless they had a claim against the Treasury for their loss. In this indirect way it became evident that only in case the pledgees had such a claim was the claim of the Alien Property Custodian valid [fol. 63] against the corporation. The Supreme Court dealt with this aspect of the case in the following language: "The Constitution guarantees to friendly aliens the right to just compensation for the requisitioning of their property by the United States. *Russian Fleet* v. *United States, supra.* We must assume that the United States will meet its obligations under the Constitution. Consequently friendly aliens will be compensated for any property taken and Silesian is protected by the exculpatory clauses of the Act from any claim from its alien stockholders." * When the case was before us, we developed the same reasoning in a little more detail.** The contract in that case was "implied" in favor of the pledgees, while here it must be "implied" in favor of the defendants, but the principle is precisely the same; and indeed we rested our ruling upon those very decisions which we have cited more at length here.

There can be no doubt that the result we reach accords with the purpose of the Act and with the policy of the United States in both wars. To make it impossible for the Alien Property Custodian to reduce to possession debts or choses in action owed to aliens by our citizens would exempt a vast amount of enemy property, perhaps even the greater part that is within our reach. Without such an "implied contract" every obligor, certainly if he had business abroad, might with justice complain that the Act did not protect him, and it would be hard to find any answer to his claim that the Constitution protected him. Once it is decided that bonds stand in no different position from any

---

* *Silesian-American Corp.* v. *Clark, supra,* pp. 479, 480 (332 U. S. 469).

** *Silesian-American Corporation* v. *Markham,* 156 Fed. (2) 793, 797.

other chose in action, the result is plain. That they do not is equally plain.

Judgment reversed: summary judgment to be entered for the plaintiff on his motion.

[fol. 64] UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 13th day of June one thousand nine hundred and fifty-one.

Present: Hon. Harrie B. Chase, Hon. Jerome N. Frank, Hon. Learned Hand, Circuit Judges.

J. HOWARD MCGRATH, Atterney General as Successor to Alien Property Custodian, Plaintiff-Appellant,

v.

CITIES SERVICE COMPANY, & ANO., Defendants-Appellees

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed; summary judgment to be entered for the plaintiff on his motion in accordance with the opinion of this Court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

(S.) Alexander M. Bell, Clerk.

[fol. 65] [Endorsed:] United States Court of Appeals, Second Circuit. J. Howard McGrath, Attorney General, v. Cities Service Company & ano. Judgment. United States Court of Appeals, Second Circuit. Filed June 13, 1951. Alexander M. Bell, Clerk.

[fol. 66] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 67] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 305

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed November 5, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is transferred to the summary docket and assigned for argument immediately following No. 178, Uebersee Finanz-Korporation, A. G. vs. McGrath.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.